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In the Supreme Court of the United States

OCTOBER TERM, 1977

JUAN M. HUERTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner claims that the United States must compensate him for damage to or loss of his property at Guantanamo Naval Base in Cuba. The Court of Claims dismissed his petition in an opinion on which we principally rely (Pet. App. A).

In 1960, 1961, and 1962, petitioner was awarded and performed five demolition contracts at the Guantanamo Naval Base, and he took the materials from the structures that he demolished as the principal consideration for his work. Petitioner's practice under previous contracts had been to remove the materials he salvaged to his place of business in Santiago, Cuba, for resale. However, petitioner did not remove the materials salvaged from the work on these five contracts. Instead, the materials remained on a storage site on the base. The materials are

now valueless due to prolonged exposure and alleged pilferage (Pet. App. A-2).

Petitioner sued to recover the value of the materials, contending that the United States breached the demolition contracts by refusing to let him take his materials from the Naval Base into Cuba. Petitioner also claimed that refusal of such permission amounted to a taking of the property and that in any event the United States was indebted to him because its agents allegedly appropriated the materials for use in government buildings on the base. The United States answered that petitioner in fact had never requested permission to remove the materials and that it was not responsible for whatever pilferage may have taken place (Pet. App. A-2 to A-3).

The Court of Claims, with one judge dissenting, found that petitioner had not proven that he was entitled to recover and dismissed his petition. The court noted that the "fundamental issue" on the breach of contract and taking claims was "whether [petitioner] actually ever requested permission to take his materials from the base and into Cuba" (Pet. App. A-5). The court found that petitioner had never made such a request to anyone in authority. Instead, the court found (Pet. App. A-8):

> [T]he evidence compels the conclusion that [petitioner] elected to retain the materials at the storage site on Guantanamo, rather than ship his property into Castro Cuba, because that was the lesser of two evils during the period in question.

Similarly, the Court of Claims rejected petitioner's pilferage claim because "here again the evidence falls short" (Pet. App. A-10): "It has not been shown that materials were removed by persons acting without [petitioner's] permission, that those persons were Government

agents, or that the material so removed was incorporated in Government construction."

As to petitioner's claim that the government's export ban and trade embargo constituted an impermissible "taking" of property in violation of the Fifth Amendment, the court held that these "general acts of the sovereign * * * do not establish liability for breach, or for a taking in the circumstances of this case" (Pet. App. A-9, n. 2; A-13).

Petitioner argues that the government's ban of exports to, and its embargo of trade with, Cuba constituted a "taking" of his property in violation of the Fifth Amendment (Pet. 12-13). This contention is without merit. Although "every regulation necessarily speaks as a prohibition," a sovereign's valid exercise of its powers does not amount to a taking of property merely because it restricts the use of the property. *Goldblatt* v. *Hempstead*, 369 U.S. 590, 592; *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F. 2d 646, 678 (C.A. 1). Here, the trade embargo at most prevented petitioner from removing his property into Cuba. He travelled to the United States in 1963 in an attempt to sell the materials in this country but was unsuccessful (Pet. App. A-8). In any event, removal of the materials to Cuba would have been risky indeed, since petitioner's place of business in Santiago was seized by the Cuban government and petitioner was "reimbursed for only a fraction of its true value" (Pet. App. A-7). Indeed, the court below concluded from the evidence that petitioner chose to keep the materials on the base to avoid further seizure (Pet. App. A-8). Under these circumstances, the court was plainly correct in holding that the trade embargo did not effect a taking of petitioner's property.

Petitioner's argument that he was denied "procedural due process" is premised on a contention that the court below refused to accord proper weight to petitioner's evidence (Pet. 13-16). As petitioner himself concedes (Pet. 13-15), while one of the witnesses, Sergeant Alvarez, testified that petitioner did request permission to remove his goods into Cuba, other witnesses, Captain Burky and Lieutenant Cronenberg, testified that he never made any such request (Pet. 15). The trial judge acknowledged that the testimony on this issue was in "direct conflict" (Pet. App. A-4) and concluded that petitioner had chosen not to remove his property from the base and so expose it to seizure by the Cuban government. The trial judge's conclusion on this issue does not warrant this Court's review.

Similarly, petitioner attempts (Pet. 16-17) to reargue his pilferage claim. The court below found that petitioner failed to prove any of the essential elements of that claim (Pet. App. A-9). Specifically, the trial judge noted that no witness saw base personnel actually remove material from the stockpile without petitioner's permission (Pet. App. A-8). Furthermore, "the quantum of materials said to have been taken was not stated; the authority of the alleged pilferers was not established; and the base structures which allegedly benefited from the pilferage were not identified" (*ibid.*). There is no reason for this Court to review this factual finding by the trial judge.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.